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SUPREME COURT U.S.

IN THE

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OF THE UNITED STATES

October Term 1906

No. 402

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

PETITION FOR REHEARING.

and

PETITION TO MAKE OPINION MORE CERTAIN IN EVENT APPLICATION FOR REHEARING DENIED.

T. C. BACH,
J. H. RALSTON,
M. S. GUNN,
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J. B. CLAYBERG,
F. L. SIDDONS,
IRA T. WIGHT,
W. E. RICHARDSON,
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PETITION FOR REHEARING.

Now comes the defendant in error in the above entitled cause and respectfully petitions this court for a rehearing for the reasons:

I.

That the court has overlooked the fact that by the judgment in the specific performance case it was determined that the effect of the bond was to establish the

boundary line between the St. Louis and Nine Hour claims, and that such was the intention and agreement of the parties thereto; and that by such judgment it was also determined that the compromise ground is and always has been a part of the Nine Hour claim.

(a) The bond or contract to convey the compromise ground having been so construed upon issues presented in the action to obtain a specific performance thereof, and such construction having been essential to the judgment in such action, such judgment is evidence conclusive that the purpose of the bond was to establish the boundary line between the Nine Hour and St. Louis claims, and that the compromise ground is and always was a part of the Nine Hour claim, by reason of which the bond is not open to construction in this case.

(b) The judgment in the specific performance case having directed a conveyance of the property described in the bond, as construed in said case, the deed must be taken as conveying only that which Mayger by the bond agreed to convey, by reason of which the deed is not open to construction in this case.

II.

That the judgment in the specific performance case is absolutely controlling in the decision of the question considered by the court.

III.

That the court has inadvertently overlooked the fact that the plaintiff in error, by its answer, admits the allegations in paragraphs 1, 2 and 3 of the second amended and supplemental complaint.

Judgment in Specific Performance Case Determines Question Considered by the Court, and such Determination Conclusive Between Parties Hereto.

This court in its opinion says:

> "We pass, therefore, to a consideration of the merits, and the first question presented by counsel —indeed, as we look at it, the pivotal question—is the proper construction of the bond and deed by which the plaintiff in error claims title to the compromise ground."

This question is then considered, and it would seem that in the consideration of the question the court has completely overlooked the judgment in the specific performance case, to which attention is now called.

The following is quoted from the opinion:

> "Nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance. True, the plaintiff in error alleged that the compromise ground was a part of its mining claim, and that the bond was executed 'to settle and compromise the said suit and adverse claims, and for the purpose of settling and agreeing upon the boundary line between' the two claims; but the bond itself, reciting the fact of a settlement and compromise, and an agreement by the contestants to withdraw their objections to an application for a patent stipulates for a conveyance after patent, of the compromise ground, 'comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim,' they being, respectively, the two claims owned by the parties hereto. Further, the answer denied that the compromise ground was

a part of the Nine Hour claim, and alleged that the then owner of the St. Louis lode claim executed the bond as a compromise of the adverse claim and suit, and to enable him to obtain a patent for the whole of his claim."

In the replication in this case it is alleged by defendant in error in answer to the affirmative defense pleaded by plaintiff in error, that in the action for specific performance:

> "It was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour lode mining claim, and was by the parties to said agreement, agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the Nine Hour lode mining claim and the St. Louis lode mining claim, the boundaries of which claims had been and were at the time of the execution of said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement." (Rec. p. 14.)

The judgment roll in the specific performance case was introduced in evidence by defendant in error as a part of its case, without objection from plaintiff in error. (Rec., p. 41.)

MATTERS IN ISSUE IN SPECIFIC PERFORMANCE CASE AND DETERMINED BY JUDGMENT THEREIN.

In the complaint in the specific performance case it is

alleged that the predecessors in interest of the plaintiff were, prior to the 7th day of March, 1884, the date of the bond,

> "the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground comprising a portion of the Nine Hour lode mining claim."

Then follows a description of the compromise ground. It is further alleged that Mayger

> "had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the 26th day of July, 1880, have been, a part of the Nine Hour lode mining claim, so that the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession, and entitled to the possession thereof." (Rec., p. 42.)

In this connection it should be noticed that there is no claim or pretense in the complaint in the specific performance case that the area in conflict between the two claims was greater or more than the compromise ground.

It is also allged:

> "That thereupon, and on the 7th day of March, 1884, to settle and compromise the said suit, and the adverse claim, and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode mining claim and the said St. Louis lode mining claim".

the bond was made, executed and delivered; that by the bond Mayger

> "covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns a good and sufficient deed of and for all the premises so above particularly mentioned and described." (Rec., pp. 42-43.)

The 4th paragraph of the complaint reads in part as follows:

> "And the plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff"

demanded a conveyance, etc. (Rec., p. 43.)

These several allegations were denied by the answer. (Rec., p. 46) In the replication it is denied by plaintiff in eror that the

> "premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis mining claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent as in

the complaint herein mentioned and set forth." (Rec., p. 49.)

It is denied that the

"boundary lines of the St. Louis mining claim as originally located included or embraced the *locus in quo* or any part or portion thereof." (Rec., p. 49.)

The court found as facts:

"That the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time, and thereafter continued to be a part of said Nine Hour lode mining claim.

"That said bond was made and given * * * for the purpose * * * of determining and fixing the boundary line between the said Nine Hour lode mining claim and the St. Louis lode mining claim.

"That at the date of the execution and delivery of said bond it was expressly agreed between the parties hereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour lode mining claim.

"That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, * * * and it was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour lode mining claim." (Rec., pp. 50-52.)

In the judgment proper it is recited that:

"The court having made and filed on the 1st day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and en-

titled to the conveyance from the defendants of the legal title to the premises in the complaint and hereinafter described." * * *

JUDGMENT IN SPECIFIC PERFORMANCE CASE CONCLUSIVE BETWEEN PARTIES HERETO OF MATTERS DETERMINED BY SUCH JUDGMENT.

Although, as stated by the court, "nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance," we respectfully submit that the judgment in that case constitutes evidence conclusive upon the issues determined and the facts found which were essential to sustain such judgment.

Cromwell v. Sac County, 94 U. S. 351.
Southern P. R. Co. v. United States, 168 U. S. 47.
Fayerweather v. Ritch, 195 U. S. 276.

In the opinion in the case of Southern P. R. Co. v. United States, cited above, the court speaking through Mr. Justice Harlan, said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil

courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In the case of Fayerweather v. Ritch, 195 U. S. 276, this court, speaking through Mr. Justice Brewer, said:

"We pass, therefore, to consider the merits of the case. Private rights and public welfare united in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties. *Interest rei publicae ut sit finis litium.* But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it, and that the question was decided."

The principles of law stated in the foregoing quotations have been recognized by this court by an unbroken line of authorities, commencing with Hopkins vs. Lee, 6 Wheaton, 109, to and including the case in 195 U. S., cited above.

BOND HAVING BEEN CONSTRUED IN SPECIFIC PERFORMANCE CASE, NOT OPEN TO CONSTRUCTION IN THIS CASE.

It was alleged in the complaint that the compromise ground constituted a part of the Nine Hour claim prior to the execution of the bond. The court so found.

It was alleged that the purpose of the parties to the bond was to fix and determine the boundary between the two claims, and that by the bond Mayger covenanted and agreed to convey the compromise ground, or that which was always a part of the Nine Hour claim. The court so found.

It was alleged that by the conveyance to the plaintiff in the case of the Nine Hour claim the compromise ground was conveyed, because it was a part of the Nine Hour claim. The court so found.

There is no allegation in the complaint that the plaintiff in the case obtained any assignment of the bond. The right of plaintiff in error to a conveyance was based upon its ownership of the Nine Hour claim and the fact that the compromise ground was a part of such claim.

It was necessary, therefore, for the plaintiff to allege and prove that the compromise ground was always a part of the Nine Hour claim, that the purpose of the agreement was to fix and determine the boundary between the claims, and that by the bond Mayger covenanted and agreed to convey that which was a part of the Nine Hour claim. If the compromise ground embraced any part of the St. Louis claim, as the plaintiff had not received any assignment of the bond or any conveyance of the compromise ground, except as the same was embraced in the conveyance of the Nine Hour claim, the plaintiff would necessarily have failed in its suit.

In this connection attention is called to the opinion of the circuit court of appeals in the case (102 Fed. 430), in which it is stated:

> "When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim."

This court in the opinion in this case says:

> "It is undoubtedly true that if the bond had simply described the surface area or fixed the boundary line between the two claims the subsurface and extralateral rights might have been determined by the mining law."

As a matter of fact the bond as construed in the specific performance case upon issues duly presented did fix the boundary line between the two claims. The judgment in the specific performance case being conclusive between the parties hereto the bond is not now open to construction.

The court found in the specific performance case that "the plaintiff is the owner of the equitable, and entitled to a conveyance by the defendants of the legal title" to the compromise ground. (Rec., p. 53.) The plaintiff had obtained a conveyance of the Nine Hour claim, and by such conveyance had acquired the equitable title to the compromise ground, because the compromise ground was a part of such claim. It was not claimed, and the court did not find, that by such conveyance the plaintiff had acquired any part of the St. Louis claim. It follows that the plaintiff, when it commenced the action for

specific performance, was the owner of that only which belonged to and was a part of the Nine Hour claim, and was not the owner of the ore in controversy, because such ore is in a vein apexing in the St. Louis claim, which was not a part of the Nine Hour claim.

The opinion of this court in the specific performance case (171 U. S. 679) shows that this court treated the judgment as requiring a conveyance of a part of the Nine Hour claim. In the opinion of this court just referred to it is said:

> "The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition."

After the plaintiff had alleged the intention of the parties to the bond and placed its construction upon the bond in the specific performance case, in order that it might compel a conveyance of the compromise ground, the intention of the parties and the construction of such bond should be treated as forever foreclosed.

Winona & St. P. L. Co. v. Minnesota, 159 U. S. 524.

In the case just cited it was contended that a certain contract was open to construction and did not pass an

equitable title. It appeared that in previous litigation a decree had been entered requiring the specific performance of such contract. This court refers to the former decree and, speaking through Mr. Justice Brewer, says:

> "It is, therefore, unnecessary to enter into any elaborate discussion of the terms and stipulations of the contract, or to seek to determine what are or are not dependent covenants. It is enough to rest upon the fact that by a conclusive decree of a competent court it is established that the full equitable title had passed to the plaintiff in error prior to the time at which the lands were adjudged taxable."

The plaintiff in error having alleged in the specific performance case that the purpose of the bond was to establish the boundary between the two claims and that the compromise ground is and always was a part of the Nine Hour claim, and the court having so found, and the judgment having so determined, the plaintiff in error should not be permitted now to change its position.

Davis v. Wakalee, 156 U. S. 680.
Ohio, etc. R. Co. v. McCarthy, 96 U. S. 267.

DEED ONLY CONVEYED PROPERTY WHICH MAYGER BY THE BOND, AS CONSTRUED IN SPECIFIC PERFORMANCE CASE, AGREED TO CONVEY.

The deed was not a voluntary deed, and must be treated as conveying only that which the judgment directed to be conveyed. When the judgment is construed in the light of the pleadings and findings, as it should

be (Hornbuckle v. Stafford, 111 U. S. 380), the expression "all mineral therein contained" can not refer to any mineral except such as belonged to and was a part of the Nine Hour claim. The fact that the deed which the court approved contains the clause, "together with all the mineral therein contained," and also the language, "together with all dips, spurs, angles," etc., instead of evidencing an intention on the part of the court to direct a conveyance which should have the effect of a common law conveyance, shows conclusively that the court intended the conveyance to carry the mineral rights attaching to the Nine Hour claim. The court had found that the purpose of the bond was to determine the boundary line, and that the compromise ground was and always had been a part of the Nine Hour claim. In the light of these findings the plaintiff in error was entitled to the extralateral rights attaching to the compromise ground, and when the court directed that the conveyance should include the "dips, spurs, angles," etc., it intended the conveyance to conform to its findings and judgment. In other words, the court having found and determined that the plaintiff was entitled to a conveyance of the compromise ground as a part of the Nine Hour claim, used the language, "together with all dips, spurs, angles," etc., so that there would be no room for the contention that the expression, "together with all mineral therein contained," covered and embraced only the mineral beneath the surface.

This court in its opinion, in referring to the language of the deed, says:

> "Further, while it may be true that the words 'together with all the dips, spurs and angles,' etc.,

> are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed, 'together with all the mineral therein contained,' and they can not be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that they are only equivalent to those that follow, 'dips, spurs,' etc., that the same thing is meant by each expression. While of course repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant."

The language contained in the deed, viz: "together with all dips, spurs, angles," etc., is not contained in the bond. The bond merely described boundaries of the compromise ground and provides for a conveyance thereof, "together with all mineral therein contained."

If the judgment is construed to require a conveyance of more or other property than that described in the bond, the judgment would be void to the extent of such excess or other property. Suppose a contract should provide for the conveyance of one acre, and an action should be brought for the specific performance of such contract, and the judgment should require a conveyance of the one acre and ten additional acres. To the extent of the additional acres the judgment would necessarily be void because not supported by the pleadings. So in this case the judgment must be construed in the light of the pleadings, and as the complaint demanded a specific performance of the bond, the judg-

ment can not be treated as requiring a conveyance of any property not described in the bond.

It follows that the language of the deed, "together with all dips, spurs, angles',, etc., unless treated as having the same meaning as the expression, "together with all mineral therein contained," must be treated as surplusage.

It having been alleged, and the court having found and determined in the specific performance case, that the purpose of the bond was to establish the boundary line between the two claims, that the compromise ground is and always was a part of the Nine Hour claim, and that plaintiff in error, by virtue of the conveyance to it of the Nine Hour claim, obtained the equitable title to the compromise ground, the deed must be taken as conveying only the property covered by the bond as construed in the said specific performance case, or that which was always a part of the Nine Hour claim. A patent from the United States, whatever its language, conveys only that which the law authorizes to be conveyed. So the deed here can not convey more than the bond as construed, agreed to convey.

The circuit court of appeals in its opinion (102 Fed. 430), in construing the deed to the compromise ground, considered the pleadings and decree in the specific performance case, and the theory upon which that suit was maintained. It is fair to suppose that District Judges Knowles and Hunt, who also passed on the question, considered the same matters.

Admission Made by Plaintiff in Error in the Pleadings in This Case.

In the second paragraph of the second amended and supplemental complaint the St. Louis claim is described as embracing within its boundaries certain surface area, "save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim." Then follows a specific description of the boundaries of the compromise ground, with the added clause, "together with all mineral therein contained." (Rec., pp. 2 and 3.) In the third paragraph it is alleged that the Nine Hour claim, "including the thirty-foot strip or compromise ground aforesaid," was located subsequent to the location of the "said St. Louis claim." (Rec., p. 3.)

The first paragraph of the answer reads as follows:

> "It admits the allegations contained in paragraphs 1, 2 and 3 of the said second amended and supplemental complaint." (Rec., p. 7.)

As it is admitted that the compromise ground belongs to and is a part of the Nine Hour claim, and that the Nine Hour claim, including the compromise ground, was located subsequent to the location of the St. Louis claim, it necessarily follows that the Nine Hour claim when located embraced the compromise ground, and that the compromise ground was never a part of the St. Louis claim.

This court in its opinion calls attention to the recital or statement in the bond that the compromise ground comprises "a part of two certain quartz lode

mining claims, known as the St. Louis lode claim and the Nine Hour lode claim." We submit that this recital or statement should not be accepted as against the admission of plaintiff in error now made by its answer in this case. It is elementary law that parties are bound by admissions made in the pleadings in a case. The plaintiff in error could not have introduced in evidence the bond for the purpose of disproving its admission that the compromise ground is and always was a part of the Nine Hour claim, and for this reason the court should not have taken the recital or statement in the bond as against the admission in the pleadings in this case.

Now, if the compromise ground is a part of the Nine Hour claim, and was a part of such claim when located, and was never a part of the St. Louis claim, what was conveyed by the conveyance of the compromise ground, "together with all mineral therein contained?" Bearing in mind that the compromise ground is a part of the Nine Hour claim, and was a part of such claim when located, or otherwise the Nine Hour claim, including the compromise ground, could not have been located subsequent to the location of the St. Louis claim, the conclusion is irresistible that the conveyance of the compromise ground conveyed only that which was a part of the Nine Hour claim, as located, and the expresssion, "all mineral therein contained," refers to the mineral which was a part of the Nine Hour claim, and not to the mineral which was a part of the St. Louis claim. The compromise ground is described as not only embracing the surface area, but as also embracing "all mineral therein contained." It is the compromise ground, as thus described, that is admitted to be and always to have been a part of the Nine Hour claim. The conveyance, there-

fore, could not convey anything more than that which belonged to and was a part of the Nine Hour claim when located. By the location of the Nine Hour claim the locators did not acquire any right to any of the ore in controversy, and when a conveyance was made of that which belonged to and was a part of the Nine Hour claim, such conveyance could not convey the said ore.

Furthermore, it is alleged in the second paragraph of the second amended and supplemental complaint, and admitted by the answer, that the defendant in error "is the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis lode mining claim, and of the quartz, rock and other precious ore contained in all veins, lodes and ledges of mineral bearing rock through their entire depth, the tops or apexes of which lie within the surface lines" of the said St. Louis claim as described. (Rec., p. 2.)

We therefore submit and earnestly insist that if the court had not overlooked the judgment in the specific performance case and what is expressly admitted by the pleadings in this case, to which attention has been directed, the decision of the questions considered would have been different.

* * * * * *

As we understand the opinion of the court, it is held that the conveyance of a portion of a mining claim, "together with all mineral therein contained," may or may not pass title to the mineral underneath the surface, depending upon the intent of the parties. This holding is so far reaching in its consequences, in that it will disturb the titles to so much mining property in this western country, and the question is of such public

interest, that we respectfully submit further consideration of the question should be had before the decision becomes absolutely final.

The late Senator Brown, one of the attorneys for defendant in error, appreciating the importance of the questions involved in this case, had thoroughly prepared to present such questions as they should be presented. Owing to an unfortunate tragedy, Senator Brown was not able to be present at the argument, and Mr. M. S. Gunn, who presented the case, not having intended to argue the merits, was poorly equipped for the argument. It was probably due to this condition of affairs that the attention of the court was not directed to the facts which it now appears were overlooked, and which seem to us to be controlling in the case.

Under the circumstances, we respectfully submit that in justice to defendant in error, and in justice to the mining interest of the west, a rehearing should be granted.

Respectfully submitted.

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Of Counsel.

I, M. S. Gunn, one of the attorneys for the defendant in error, do hereby certify that the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

M. S. GUNN.

(For petition to make opinion more certain, see following page.)

PETITION TO HAVE OPINION MADE MORE CERTAIN.

If the application for the rehearing should be denied your petitioner respectfully requests the court to state with greater certainty in the opinion the holding and decision of this court in said case.

The opinion as understood by petitioner and its attorneys decides that the deed to the compromise ground "together with all mineral therein contained" may or may not have conveyed the ore beneath the surface of the compromise ground and contained in the section of the Drum Lummon vein having its apex within the surface boundaries of the St. Louis claim, depending upon the intent of the parties as disclosed by evidence of such intent.

As the subject matter of the conveyance is mining property does the presumption obtain that the conveyance was intended to convey only the subsurface rights attaching to the compromise ground, or is it to be presumed that the parties intended that the deed should have the effect of a conveyance at common law? In other words upon whom rests the burden of proof as to the intent of the parties?

We submit that as a new trial will be had the holding and decision of the court should be stated with such

certainty that no controversy can arise regarding the matter.

Respectfully submitted,

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